UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ROUNDY'S INC.,

and 30-CA-17185

MILWAUKEE BUILDING AND
CONSTRUCTION TRADES
COUNCIL, AFL-CIO.

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AND THE BUILDING AND CONSTRUCTION TRADES DEPARTMENT OF THE AFL-CIO AS *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations and the Building and Constructions Trades Department of the AFL-CIO file this brief in response to the request of the National Labor Relations Board for *amicus* briefs addressing "what legal standard the Board should apply in determining whether an employer has violated the Act by denying nonemployee union agents access to its premises while permitting other individuals, groups, and organizations to use its premises for various activities." *Roundy's Inc.*, 356 NLRB No. 27, pp. 1-2 (Nov. 12, 2010).

1. The D.C. Circuit's opinion in *Lucile Salter Packard Children's Hospital v. NLRB*, 97 F.3d 583, 587 (D.C. Cir. 1996), articulates the appropriate legal standard for determining whether an employer has discriminatorily prohibited union distribution of a message in violation of

Section 8(a)(1). The D.C. Circuit's formulation of the legal standard is taken from the Board's leading discrimination precedents and reflects the standard consistently applied by the Board. The Board should expressly reaffirm that standard and explain its statutory basis.[1]

In *Lucile Salter Packard*, the D.C. Circuit states the basic Section 8(a)(1) antidiscrimination rule as follows:

> "An employer may not exercise its usual right to preclude union solicitation and distribution on its property if the employer permits similar activity by other nonemployee entities 'in similar, relevant circumstances.' *Jean Country*, 291 NLRB 11, 12 n. 3 (1988)." 97 F.3d at 587.

Under this rule, "an employer engages in discrimination as defined by section 8(a)(1) if it denies union access to its premises while allowing similar distribution or solicitation by nonemployee entities other than the union." *Ibid.*, citing *D'Alessandro's, Inc.*, 292 NLRB 81, 83-84 (1988).

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[1] The Board's *Register Guard* decision has no bearing here. *Register Guard*, 351 NLRB 1110 (2007), *enf. denied in part, Register Guard v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009). In the first place, the Board majority's discrimination analysis in that decision was incorrect for the reasons stated by the D.C. Circuit in reversing that decision. 571 F.3d at 58-60. Secondly, the question of employee access addressed in *Register Guard* should be decided, not by the sort of discrimination analysis applied in deciding the question of nonemployee access, but by determining whether the employer has advanced sufficient managerial reasons for restricting employee access. *See Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491-92 (1978); *Eastex, Inc. v. NLRB*, 437 U.S. 556, 573 (1978).

The D.C. Circuit's formulation of the Section 8(a)(1) antidiscrimination rule is helpful because it focuses on whether an employer has treated similar *activities* differently. This focus on behavior is crucial, because Section 8(a)(1) forbids an employer from suppressing the dissemination of NLRA-protected messages based on the protected content of those messages. The Board's earliest Section 8(a)(1) decisions explain the statutory basis for the antidiscrimination rule.

2. "Discrimination is a form of inequality, which poses the question: 'equal with respect to *what?*'. A person making a claim of discrimination must identify another case that has been treated differently and explain why that case is 'the same' in the respects the law deems relevant or permissible as grounds of action." *Guardian Industries Corp. v. NLRB*, 49 F.3d 317, 319 (7th Cir. 1995)(emphasis in original). Thus, to make out a claim of discrimination in violation of Section 8(a)(1) of the NLRA, it is necessary "to establish that the cases among which the employer has distinguished are indeed 'similar' in all respects relevant to labor policy." *Id.* at 321.

The *Lucile Salter Packard* opinion makes clear that the relevant point of comparison for purposes of discrimination analysis under Section 8(a)(1) is whether an employer that has "preclude[d] union solicitation and distribution on its property" has permitted "similar activity by other nonemployee entities" under "similar, relevant circumstances." 97 F.3d at

587. "Similar activity" refers to the type of activity engaged in by the outside groups, such as distributing the group's message, while "similar, relevant circumstances" refers to the time, place and manner of that activity. What is not a relevant point of comparison, however, and thus cannot be a reason for denying union access to property, is the protected content of the message conveyed by the union. *Id.* at 590-91. In other words, "[w]hat the [employer] cannot do . . . is prohibit the dissemination of messages protected by the Act on its private property while at the same time allowing substantial civic, charitable, and promotional activities." *Sandusky Mall Co.*, 329 NLRB 618, 622 (1999), *enf. denied, Sandusky Mall Co. v. NLRB*, 242 F.3d 682 (6th Cir. 2001). *Accord D'Alessandro's*, 292 NLRB at 84 ("disparate treatment based on the content of the Union's message" violates Section 8(a)(1)).

The terms of the Act preclude an employer from relying on the substance of a protected message as grounds for prohibiting union communicative activity while allowing other similar communicative activity conveying a different type of message. Section 7 guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. And

Section 8(a)(1) makes it "an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1). An employer that prohibits a union from disseminating a message protected by Section 7, while permitting the distribution of other messages by outside entities, unlawfully "interfere[s] with . . . the exercise of the rights guaranteed in section 7." The Board's earliest Section 8(a)(1) decisions, endorsed by the Supreme Court's opinion in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 111 n. 4 (1956), articulate this statutory basis for the antidiscrimination rule.

The principal authority cited by the *Babcock* opinion for the proposition that an employer may not "discriminate against [a] union" by prohibiting distribution of the union's message while "allowing other distribution," *id.* at 112, is *NLRB v. Stowe Spinning Co.*, 336 U.S. 226 (1949), *id.* at 111 n. 4. In *Stowe Spinning Co.*, 70 NLRB 614, 621-22 (1946), the Board held that the employer's "refusal . . . to permit use of [its] hall for purposes of self-organization in a labor union," while allowing "[v]arious churches," "'Ladies Aid' societies," and a local school "the use of the hall," "constituted unlawful disparity of treatment and discrimination against the Union." What made the employer's "discriminatory treatment of the Union in the use of the [employer's] property" an unfair labor practice

under NLRA § 8(a)(1) was that the "purpose of [the employer's] action . . . was to impede, prevent, and discourage self-organization and collective bargaining . . . within the meaning of Section 7 of the Act." *Id.* at 624.

The earlier decisions cited in *Stowe Spinning* to support the proposition that such discrimination violates Section 8(a)(1) confirm that "disparity of treatment" that interferes with dissemination of an NLRA-protected message is unlawful. *Stowe Spinning*, 70 NLRB at 622 & n. 9. For instance, in *Gallup American Coal Co.*, 32 NLRB 823, 829 (1941), the employer was found to have violated Section 8(a)(1) by obliterating union signs that had been painted on boulders located on the employer's property, while allowing "[a] number of signs . . . of an advertising or religious nature [to] be[] painted on these boulders." The Board explained that "singling out of only the union signs for obliteration" violated Section 8(a)(1), because "in painting out the union signs, the [employer] desired to prevent the Union's message from reaching its employees rather than to protect its rights to exclusive possession of its property." *Id.* at 829 & n. 4. *See id.* at 830 ("by obliterating the union signs . . . the [employer] has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act"). *See also Weyerhaeuser Timber Co.*, 31 NLRB 258, 267 (1941) (discriminatory exclusion of union representatives "in order to impede the processes of self-organization and

collective bargaining" violates Section 8(a)(1)).

In sum, "[t]he employer may not affirmatively interfere with organization," *Babcock*, 351 U.S. at 112, or with any other NLRA-protected activity by "singl[ing] out a particular [NLRA-protected message] for suppression because it [i]s . . . disfavored," *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 541 (2001). This is so, precisely because "the content of the Union's message," *D'Alessandro's*, 292 NLRB at 84, when it is a "message[] protected by the Act," *Sandusky Mall*, 329 NLRB at 622, is not a ground that "the law deems relevant or permissible as grounds of action," *Guardian Industries*, 49 F.3d at 319. And, this is so even if the union's message is different from the messages other outside groups have been allowed to disseminate on the employer's property.[2]

3. The logic of the Board's long-standing Section 8(a)(1) discrimination analysis is demonstrated by the circumstances in this case.

The Milwaukee Building and Construction Trades Council is composed of unions that represent construction workers throughout the Milwaukee area. 356 NLRB No. 27, p. 3. The Council went on the

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[2] To be clear, the employer violates Section 8(a)(1) if it suppresses an NLRA-protected message on the basis of its protected content, regardless of whether the employer has acted with ill-will. In other words, the test is not whether the employer acted invidiously towards the union but whether the disparate treatment is based on the protected message. *Cf. Colorado Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008)("The intent to discriminate . . . is merely the intent to treat

premises of various retail stores owned and operated by Roundy's Inc. to protest Roundy's use of "nonunion contractors, who did not pay their employees prevailing wages and benefits, to build or remodel its stores." *Id.* at 4. Agents of the Council peacefully distributed leaflets that called upon customers "to contact [Roundy's] in support of the Council's efforts to protect the prevailing wage rates and benefits of its member unions" and "not to patronize [the store]" if Roundy's continued "using cheap labor to build and remodel its stores." *Ibid.* In statutory terms, the Council's leaflets contained a call to engage in "concerted activities for the purpose of . . . mutual aid or protection." 29 U.S.C. § 157. *See Great American*, 322 NLRB 17, 18 (1996) ("As a general rule, nonemployee area standards/consumer boycott handbilling like here is protected by Section 7 of the Act.").

Even though Roundy's has "permitted widespread solicitation and distribution of literature on private property both inside and outside its stores," the employer refused to allow the Council to distribute its area standards leaflets. 356 NLRB No. 27, p. 4. The permitted distribution included "various other civic, political and/or charitable solicitations." *Ibid.* *See also id.* at 6 (outside groups allowed to distribute messages addressed to "clearly controversial topic[s]."). In defense of excluding the

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differently.").

Council distribution, Roundy's argued "that permitting solicitation by charitable, civic or political groups is not the same as urging a boycott of a business and therefore there is no discrimination." *Id.* at 5.[3]

It may well be that the "permitt[ed] solitication[s] by charitable, civic or political groups" did not include messages "urging a boycott of a business," but that does not mean that the permitted distributions and the prohibited Council distributions are not "'similar' in all respects relevant to labor policy." *Guardian Industries*, 49 F.3d at 321. The boycott message that Roundy's would "single out . . . for suppression," *Velazquez*, 531 U.S. at 541, is a call for "concerted activit[y] for the purpose of . . . mutual aid or protection," 29 U.S.C. § 157, and it is precisely such protected activity that Section 8(a)(1) forbids an employer to suppress. Thus, the fact that the Council's leaflets contain a call for NLRA-protected activity is not a ground that "the law deems relevant or permissible as grounds of action." *Guardian Industries*, 49 F.3d at 319.[4]

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[3] Had Roundy's failed to advance any explanation for its disparate treatment of the union distribution or had it advanced a pretextual explanation, the Board could infer that Roundy's was excluding the union for the purpose of interfering with NLRA-protected activity. *See Four B Corp. v. NLRB*, 163 F.3d 1177, 1181 (10th Cir. 1998). Roundy's has admitted that it prohibited distribution by the Council because the Council's message called for concerted activity in the form of consumer protests against substandard wages and benefits.

[4] Even if Roundy's had previously barred other consumer-boycott appeals that were not covered by the NLRA, suppressing the Council's appeal would have constituted unlawful discrimination under Section

The Board (Chairman Stephens and Members Johansen and Cracraft) confronted the precise situation presented by this case in *D'Alessandro's*, a decision cited with approval by *Lucile Salter Packard*, 97 F.3d at 590. In *D'Alessandro's*, a union picketed and distributed leaflets asking customers not to shop at a nonunion store and to instead patronize certain identified union stores. 292 NLRB at 81. The employer's "property was regularly the scene of a wide range of commercial and other activity unrelated to the operation of the store," but the union was nevertheless prohibited from distributing its message. *Id.* at 84. The Board held "that the Union's picketing and handbilling to inform the public that the Respondent was nonunion was conducted, at least in part, on behalf of employees of those unionized stores that the Respondent's customers were being asked to patronize" and therefore was "clearly . . . concerted activity that falls within the 'mutual aid or protection' language of Section 7." *Id.* at 83. That being so, the employer's "disparate treatment based on the content of the Union's message" "constitute[d] unlawful disparate treatment of union activities in violation of Section 8(a)(1)." *Id.* at 84

Again, an employer that permits other outside groups to distribute their message on its premises may not prohibit union distribution of a message calling for activity protected by Section 7. Prohibiting distribution

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8(a)(1) because the Council's message is protected by the NLRA.

of the union message in those circumstances constitutes discrimination in violation of Section 8(a)(1) even though the union's message is different in type from the permitted outside messages.

4. The Second Circuit has taken a different view of what constitutes discrimination in violation of Section 8(a)(1). That Circuit takes the position that "[t]o amount to *Babcock*-type discrimination, the private property owner must treat a nonemployee who seeks to communicate on a subject protected by section 7 less favorably than another person communicating on the *same subject*." *Salmon Run Shopping Center v. NLRB*, 534 F.3d 108, 116-17 (2d Cir. 2008) (emphasis added). In other words, on the Second Circuit's reading, what Section 8(a)(1) prohibits is discrimination *among* "communicat[ions] on a subject protected by section 7" and *not* discrimination *against* communications on a protected subject.

Babcock says exactly the opposite – that "[t]he employer may not affirmatively interfere with organization" or other protected activity and thus may "not discriminate *against* the union by allowing other distribution." 351 U.S. at 112 (emphasis added). And the finding of discrimination in *Stowe Spinning*, to which the *Babcock* Court pointed as an example of what was forbidden, would not have stood up under the Second Circuit's definition, for there is no indication whatsoever that the "[v]arious churches" and "'Ladies Aid' societies" and the local school that

were permitted "the use of the hall" used the hall "for purposes of self-organization in a labor union," which was the subject the union wished to address there. *Stowe Spinning*, 70 NLRB at 621.

The Second Circuit does not attempt to justify its definition of discrimination in any "respect[] relevant to labor policy." *Guardian Industries*, 49 F.3d at 321. Rather, the Second Circuit merely asserts that its position "is in substantial agreement . . . with the Sixth Circuit," 534 F.3d at 117, based on the mistaken belief "that the Sixth Circuit has construed *Babcock*'s discrimination exception to mean 'favoring one union over another, or allowing employer-related information while barring similar union-related information,'" *id.* at 116 quoting *Sandusky Mall*, 242 F.3d at 686-87. The Sixth Circuit has not so construed *Babcock*.

The Sixth Circuit takes the position that, to establish discrimination within the meaning of *Babcock*, "the alleged discriminatory conduct in allowing solicitation or handbilling requires that the discrimination be among comparable groups or activities, and that the activities themselves under consideration must be comparable." *Albertson's Inc. v. NLRB*, 301 F.3d 441, 449 (6th Cir. 2002) (internal brackets, quotation marks and citation omitted). Applying that standard, the Sixth Circuit holds that "unions and charities are [not] comparable for purposes of a discrimination analysis," *id.* at 452 n. 5, and that "an employer does not discriminate

against a union where the employer allows charities to disseminate information on the employer's property while it bars unions from doing the same," *id.* at 451. But that holding – which we consider erroneous, *see Lucile Salter Packard*, 97 F.3d at 587 n. 4 – has no application here, since Roundy's has allowed a wide array of outside groups, in addition to charities, to disseminate information on its property. *See Wal-Mart Stores, Inc.*, 340 NLRB 1216, 1217 n. 8 (2003) (Chairman Battista, concurring), *enf'd Wal-Mart Stores, Inc. v. NLRB*, 136 Fed. Appx. 752 (6th Cir. 2005). The Sixth Circuit has not gone beyond that to conclude that the only possible "comparable groups" for purposes of establishing discrimination under *Babcock* are other unions or the employer itself. *See Wal-Mart Stores*, 136 Fed. Appx. at 754, quoting *Lucile Salter Packard*, 97 F.3d at 587.[5]

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[5] To be sure, the Sixth Circuit has cited "favoring one union over another, or allowing employer-related information while barring similar union-related information," *Albertson's*, 301 F.3d at 451, as examples of treating "comparable" activities differently. But it is plain that those two examples are *not* the only examples. For instance, if an employer allowed anti-union outside groups, e.g., the Chamber of Commerce or the Right to Work Committee, onto its property to distribute handbills opposing a union's organizing campaign while barring the union from distributing handbills in support of the campaign, that would obviously constitute "discrimination . . . among comparable groups" engaged in "comparable" activities. *Albertson's*, 301 F.3d at 449.

What is more, neither example can bear scrutiny as an authoritative statement of NLRA § 8(a)(1) discrimination law. The question of employer favoritism among rival unions is governed by a different body of law developed under Section 8(a)(2). *See Machinists v. NLRB*, 311 U.S. 72, 78-

Against that background, we submit that the Second Circuit would respond favorably to a full explanation by the Board of the statutory basis for the Section 8(a)(1) definition of discrimination that the Board has employed since the earliest days of the Act and that the Supreme Court expressly endorsed in *Babcock*.

* * *

Roundy's has "engage[d] in discrimination as defined by section 8(a)(1) [by] den[ying] union access to its premises while allowing similar distribution or solicitation by nonemployee entities other than the union." *Lucile Salter Packard*, 97 F.3d at 587. The fact that "the content of the Union's message," *D'Alessandro's*, 292 NLRB at 84, differs from that of the messages other outside groups distributed on Roundy's property is not a ground that "the law deems relevant or permissible as grounds of action," *Guardian Industries*, 49 F.3d at 319. To the contrary, it is precisely employer action for the purpose of interfering with "dissemination of

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79 (1940); *NLRB v. Link-Belt Co.*, 311 U.S. 584, 598-599 (1941). As for "allowing employer-related information," the Sixth Circuit itself has rejected the proposition that "a union must have the same facilities and opportunity to solicit employees as the employer has in opposing the union." *Montgomery Ward & Co. v. NLRB*, 339 F.2d 889, 893 (6th Cir. 1965), citing *NLRB v. Steelworkers*, 357 U.S. 357 (1958). *See May Department Stores Co. v. NLRB*, 316 F.2d 797, 798 (6th Cir. 1963) (No unlawful discrimination occurred where "Company's representatives addressed employees on company premises and on company time, while . . . thereafter refusing the Union's request for opportunity to address the employees under similar conditions[,] that is, on company premises and on

messages protected by the Act," *Sandusky Mall*, 329 NLRB at 622, that Section 8(a)(1) forbids.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on January 7, 2011, I caused to be served a copy of the foregoing Brief by email on the following:

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